Supreme Court, U.S.
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No. 91-1531

In The

Supreme Court of the United States

October Term, 1991

MICHAEL CZARNECKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the forfeiture of the petitioner's house barred on double jeopardy grounds, because at the time of the forfeiture the petitioner had already been sentenced for the same act which was the basis of the forfeiture?

2. Is the forfeiture of the petitioner's house barred because evidence seized from a truck found on the premises should have been suppressed and the government would then have been unable to show a "substantial connection" between his residence and the illegal drug activity?

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No. _____

In The

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October Term, 1991

MICHAEL CZARNECKI,

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v.

UNITED STATES OF AMERICA,

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Petition For Writ Of Certiorari To The Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ for Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered December 23, 1991 and the Memorandum and Order denying the Petition for Rehearing and Rehearing En Banc entered on January 30, 1992.

THE OPINION BELOW

The case was decided by the United States Court of Appeals for the First Circuit in *United States of America v. One Parcel of Real Property with Buildings, Appurtenances*

and Improvements Known as Poles 4-5, Bear Hill Road, Cumberland, Rhode Island (No. 91-1630, December 23, 1991) and the Petition for Rehearing and Rehearing En Banc was denied on January 30, 1992.

STATEMENT OF JURISDICTION

The grounds on which the jurisdiction of this Court are invoked are as follows:

1) The entry of the judgment sought to be reviewed is December 23, 1991;

2) The Memorandum and Order denying the Petition for Rehearing and Rehearing En Banc entered on January 30, 1992.

3) This court has jurisdiction to review the judgment in question by writ of certiorari pursuant to the terms of 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

United States Constitution, Amendment IV

Search and Seizure – The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V

Presentment or indictment – Double jeopardy – Self-incrimination – Due Process – Compensation for private property – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 U.S.C. section 881(a)(7)

Subject property – (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

STATEMENT OF THE CASE

Michael Czarnecki, the petitioner herein, pleaded guilty to one count of possession with intent to distribute one hundred kilograms or more of marijuana and was sentenced on that conviction. His sentence included a period of substantial incarceration, five years, and the imposition of a fine of $31,626.40 which included the cost of some of his incarceration and supervised release.

Subsequent to the imposition of that fine, the district court granted the government's motion for summary judgment in the civil forfeiture action which is the basis of this case. As a result thereof, the petitioner's home was forfeited.

The petitioner also asserts that evidence seized from a truck found on the premises should have been suppressed. The Court of Appeals held to the contrary, adopting the findings of the District Court in the criminal case which held hearings on the suppression question.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *UNITED STATES V. HALPER*

In *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892 (1989) this Court held that if a civil sanction does not serve solely a remedial function but also serves a retributive or deterrent purpose, then it is punishment. *United States v. Halper,* 490 U.S. at 448, 109 S.Ct. at 1902. Since that decision, there has been a division among lower

courts as to the effects of the decision in civil forfeitures initiated as a result of drug prosecutions. This case presents that issue.

If the forfeiture in this case constitutes punishment, its imposition is barred on double jeopardy grounds. It would be punishment imposed in a subsequent proceeding for the same act. The double jeopardy clause applies to the imposition of punishment as well as an adjudication of guilt or innocence. *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076 (1969).

The operative question then becomes whether or not the penalty of forfeiture in this case constitutes punishment. Relying on its decision in *United States v. 40 Moon Hill Road,* 884 F.2d 41 (1st. Cir. 1989) the First Circuit held that the forfeiture of the home in this case was remedial and not punitive in nature. Opinion of the Court of Appeals at App. 11. The decision of the United States Court of Appeals for the First Circuit is in conflict with *United States v. Halper, supra,* and conflicts with the decision of the Supreme Court of Ohio in *State v. Casalicchio,* 58 Ohio St. 3rd 178, 569 N.E.2d 916 (S.Ct. Ohio 1991), *reh. denied* 60 Ohio State 3rd 705, 573 N.E. 2d 673 (1991), and the Fifth Circuit in *United States v. Sanchez-Escareno,* 950 F.2d 193 (5th Cir. 1991). It also conflicts with dicta of the Second Circuit in *United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York,* 954 F.2d 29, 1992 WL 2532 at p. 45 (2nd Cir., Jan. 3, 1992). In *Casalicchio,* the Supreme Court of Ohio held that the forfeiture of a defendant's automobile subsequent to his no contest pleas to two felony drug offenses constituted the imposition of an additional criminal penalty that violated both the Ohio and United States Constitutional

prohibitions against subjecting a person to double jeopardy. *State v. Casalicchio,* 58 Ohio 3rd at 183, 569 N.E.2d at 921.

In *United States v. Sanchez-Escareno,* various individuals were arrested for possessing marijuana and attempting to import it into the United States from Mexico. They were assessed civil fines and subsequent thereto indicted for the conduct which was the basis for the imposition of the civil fine. The promissory notes acknowledging the civil fines were executed but were never paid nor did the government ever seek to collect the same. When the individuals who had been fined were criminally charged, they moved to dismiss the cases on double jeopardy principles. The Court of Appeals for the Fifth Circuit opined that the notes in question did not constitute any payment and that therefore the defendants had not been punished and jeopardy had not attached. In reaching that conclusion, however, the court held that if the defendants had actually paid the civil fines, then any subsequent criminal prosecution would be barred by the double jeopardy clause. *United States v. Sanchez-Escareno,* 950 F.2d at 203. Clearly, the meaning of the decision in *United States v. Sanchez-Escareno,* is that the imposition of civil fines and the imposition of punishment from the bringing of criminal charges would constitute double jeopardy providing that jeopardy had, in fact, attached. In this case there can be no question that jeopardy attached in the criminal case. The defendant began serving his sentence.

In *United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, N.Y.,* the government sought the forfeiture of the claimant's interest in his

condominium because of a $250 sale of cocaine. The Court said:

> . . . we do not believe that a disproportionately large forfeiture can be reasonably justified as a civil fine as opposed to punishment by placing full responsibility for the "war on drugs" on the shoulders of every individual claimant.

United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, N.Y., 1992 WL 2532, at p. 45. The case was decided on other grounds, but the language is in almost direct contrast to the language of the First Circuit in *United States v. A Parcel of Land with a Building Located Thereon at 40 Moon Hill Road*, 884 F.2d 41, 44 (1st Cir. 1989), relied upon by the First Circuit in this case.

The forfeiture in this case was not remedial. The record in this case is absolutely silent as to the value of the interest in the home that was forfeited. There is not one scintilla of evidence that establishes whether the value of the interest was five cents, five million dollars, or some other figure. There is also absolutely no evidence of the cost to the government of the investigation of this case or any other evidence which might provide a basis for calculating the appropriate monetary value of a remedy.

There is no question that the government has the right to a remedial civil penalty related to the harm done. *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 237, 93 S.Ct. 489, 493 (1972). There is also no question that the government need not precisely quantify

the harm that has been suffered but that some approximation of the damages will suffice. Still, there must be some relationship between the sanctions denominated as civil which are sought to be imposed upon a person and the harm suffered by the government if the sanction is to be construed as remedial not punitive. *See Mullet v. Miller,* 168 Ariz. 594, 816 P.2d 251, 254 (Ariz. App. Div. 2 Dept. B 1991), *rev. denied* 1991, *cert. denied* 1992 WL 30714, 60 U.S.L.W. 3500 (February 24, 1992). The mere allegation about the harm caused by criminal activity and the alleged heavy cost of investigation is insufficient to establish that the purpose of the so called civil penalty is remedial. *United States v. Hall,* 730 F.Supp. 646, 655 (M.D.Pa. 1990).

There are many cases which have held that the imposition of civil sanctions may not constitute double jeopardy when a defendant has previously been convicted and punished for the same act. But in those cases, there is a uniform recognition of the need for the civil sanction to be remedial in nature and related in cost to the harm done by the government. *United States v. Bizzell,* 921 F.2d 263 (10th Cir. 1990). That Court there held that the assessment of a $30,000 obligation to the Department of Housing and Urban Development did not constitute the imposition of a criminal penalty because it represented only a portion of that department's losses. *United States v. Bizzell,* 921 at 265 n.2. All parties agreed that debarment from participation of programs was remedial and did not constitute punishment. With respect to the $30,000, the court noted it had an express relationship to the government's losses from the real estate transactions in which the Bizzells were involved. *United States v. Bizzell,* 921

F.2d at 267. *See* also *United States v. U.S. Fishing Vessel Maylin*, 725 F.Supp. 1222 (S.D.Fla. 1989), in which the government sought the civil forfeiture of a boat after its owner was convicted of fishing and game violations. The Court rejected the claimant's motion to dismiss holding it was possible that the government could show that the dollar value of the boat was roughly equivalent to the injury suffered by the government both in terms of the cost of its investigation and the damage to the wildlife which had occurred. *United States v. U.S. Fishing Vessel Maylin*, 725 F.Supp. at 1223. In reaching this conclusion, however, the opinion supports the position of the claimant in this case. There is a requirement that the property which is forfeited must bear some rational relationship to the loss suffered by the government. Mere exhortations about the evils of drugs do not quantify a loss suffered by the government and thus must fail as a basis for justifying the forfeiture as remedial.

II. THE DECISION OF THE COURT OF APPEALS CONCERNING THE SUPPRESSION OF EVIDENCE IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND LOWER COURTS SEVERELY LIMITING WHEN WARRANTLESS SEIZURES OF VEHICLES MAY TAKE PLACE

In the criminal case in which the petitioner was initially charged, he filed a motion to suppress evidence including a truck and the contents of the truck which were seized at the scene of the arrest. Evidence was taken and the motion was decided against the defendant in the criminal case. He thereafter pleaded in that case. In the forfeiture case, he again argued the suppression question,

incorporating by reference the arguments made in the criminal case. In the forfeiture case, the District Court did not address the suppression question and the Court of Appeals adopted the reasoning of the trial court in the criminal case and denied the motion to suppress. Opinion of the Court of Appeals at App. 10-11.

Many of the facts which form the basis for the motion to suppress are not in dispute in this case. There was a red pick-up truck followed by drug enforcement agents to the home of the claimant Michael Czarnecki. The truck was parked inside the garage of his home. Shortly after he got to his home, DEA agents arrested the claimant and others on the property. These arrests took place at approximately 12:30 p.m. Thereafter the law enforcement officials obtained a search warrant, about 5:15 p.m. more than four hours later. About 5:50 p.m., the search of the premises began. The search warrant specified as follows:

> You are hereby commanded to search on or before January 8, 1990 (not to exceed 10 days) the person or place named above for the property specified, serving this warrant and making the search (at any time in the day or night) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken and prepare a written inventory of the property seized and promptly return this warrant to Jacob Hagopian.

The warrant authorized the seizure of the property found on the premises but in no place was any seizure of any vehicle sanctioned. Rather, the warrant authorized the seizure of the following property:

> . . . certain property, namely marijuana and records indicating ownership and control of the premises noted above, as well as records of controlled substance transactions and names, addresses, and telephone numbers of customers and suppliers and proceeds from controlled substance transactions such as United States currency and safety deposit box keys, in violation of title 21, United States Code, Sections 841(a)(1) and 846, possession and conspiracy to distribute controlled substances.

Nevertheless, law enforcement agents seized the truck and took it to a garage where it was partially dismantled for the purpose of searching it.

The Court of Appeals held there was nothing illegal about the seizure of the truck even though the search warrant in question did not authorize its seizure. The Court of Appeals adopted the reasoning of the District Court in the related criminal proceeding in which there had been a hearing on the motion to suppress.

The District Court did not find that the seizure of the truck was authorized by the warrant. Yet a search warrant must specifically identify all items to be seized. *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 325, 99 S.Ct. 2319, 2324 (1979).

The District Court made no finding that the seizure of the truck was authorized by the warrant. Opinion of the District Court at App. ___. Rather the District Court found that it was "not practicable and perhaps not safe" to search the vehicle at the Czarnecki residence. Opinion of the District Court at App. ___. The District Court found that at the time of the seizure the law enforcement agents

knew the truck contained marijuana but because it was contained inside the truck it could not be reached without suitable tools and mechanical knowledge. The Court found that the original probable cause justified the search and the complexity of the search justified the removal of the car to the police station house. Opinion of the District Court at App. 15-16.

The Court cited no authority for this exception to the warrant requirement. The Fourth Amendment to the United States Constitution requires that items to be seized pursuant to a warrant be particularly identified. In this case, the warrant did not specifically identify the truck as an item to be seized.

There is no authority for the warrantless seizure in this case. There are no exigencies which justify this seizure. This Court has identified situations in which the warrant requirement of the Fourth Amendment may be relaxed, but this is not one of those situations. *See e.g., Mincey v. Arizona,* 437 U.S. 485, 98 S.Ct. 2408 (1978). The arrest of Michael Czarnecki and the three other men took place about 12:30 p.m. The search warrant which is the basis for this claim was not obtained until about 17:15 (5:15 p.m.). The search did not begin until about 5:50 p.m. Thus, Drug Enforcement Agents were at the house for over five hours during which time there was no search of the truck though it was secured. The truck was thus seized and towed more than five hours after the arrest of the claimant and others in the immediate vicinity. Indeed, the proof of the fact that there was time to get a warrant is that a warrant was in fact obtained. It permitted the search of some areas and the seizure of some items. The truck was not one of the items whose seizure was allowed

by the warrant. The fact that a warrant had already been obtained proves that there were no exigencies that precluded obtaining a warrant.

The claimant submits that the fact that the warrant in this case did not authorize the seizure of the truck mandates the suppression of the truck and the contents of the truck as evidence. The effect of such suppression would clearly be to put this case in a posture in which the government's motion for summary judgment in the forfeiture action would have to fail. The government certainly could not prevail on the claim that there was a substantial connection between the property and drug trafficking in the absence of the truck and its contents.

CONCLUSION

For these reasons, petitioner respectfully urges that this Court grant certiorari to determine whether the actions of the Court of Appeals for the First Circuit as set forth above were in error.

Dated: March 23, 1992.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1630

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

v.

ONE PARCEL OF REAL PROPERTY WITH BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS POLES 4-5, BEAR HILL ROAD, CUMBERLAND, RI,

Defendant, Appellee,

MICHAEL J. CZARNECKI,
Appellant.

Before

Breyer, *Chief Judge,*
Coffin and Bownes, *Senior Circuit Judges,*
Torruella, Selya and Cyr, *Circuit Judges.*

ORDER OF COURT

Entered: January 30, 1992

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing filed by the appellant and his suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a

majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc both be denied.

By the Court:
FRANCIS P. SCIGLIANO
Clerk.

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1630

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

v.

ONE PARCEL OF REAL PROPERTY WITH BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS POLES 4-5, BEAR HILL ROAD, CUMBERLAND, RI,

Claimant, Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND

[Hon. Ronald R. Lagueux, *U.S. District Judge*]

Before

Torruella, *Circuit Judge*,
Coffin and Bownes, *Senior Circuit Judges*.

Robert B. Mann with whom *Mann & Mitchell* was on brief for appellant.

Michael P. Iannotti, Assistant United States Attorney, with whom *Lincoln C. Almond*, United States Attorney, was on brief for appellee.

December 23, 1991

BOWNES, *Senior Circuit Judge.* This is an appeal from a grant of summary judgment in favor of the United States resulting in an order forfeiting property of claimant-appellant Michael Czarnecki to the United States. The property is the home of Czarnecki; it consists of the land and buildings located at Poles 4-5, Bear Hill Road, Cumberland, Rhode Island. We affirm the forfeiture order.

I.

"We review the grant of summary judgment *de novo,* employing the same standards utilized by the trial court." *Mello Rodriques v. Furtado,* No. 91-1262, slip op. at 6 (1st Cir. Dec. 5, 1991). A grant of summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). We must review the record, together with all reasonable inferences therefrom, in the light most favorable to the non-moving party. *Mello Rodriques,* No. 91-1262, slip op. at 6-7.

In this case the facts are undisputed. Under the Local Rules of the District Court of Rhode Island, the non-moving party admits any fact not contradicted by affidavit or other evidentiary materials that may be

considered in a Rule 56 motion. Local Rule D.R.I. 12.1(d).[1] The record before us consists of Drug Enforcement Administration (DEA) Special Agent Roberto's affidavit and the government's statement of undisputed facts, attachments to the government's motion for summary judgment. *See* Local Rule D.R.I. 12.1(a)(1).[2] Czarnecki did not provide this court or the court below with contrary affidavits or with an alternative statement consisting of facts. We therefore rely on the facts stated in the government's filings.

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[1] Local Rule 12.1(d) states:

> Uncontroverted Facts. In determining any motion for summary judgment, the court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are controverted by affidavit filed in opposition to the motion, or by other evidentiary materials which the court may consider under Rule 56 of the Federal Rules of Civil Procedure.

[2] Local Rule 12.1(a) states:

> (a) Statement of Undisputed Facts and Statement of Genuine Issues.
>
> (1) With each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, the moving party shall serve and file, in addition to the memorandum of law required under Rule 12 of these Rules, a concise statement of all material facts as to which he contends there is no genuine issue necessary to be litigated.

A. Criminal Prosecution

The Providence police, through confidential informants and a court-ordered wiretap, obtained information that Czarnecki along with Paul Lamoureaux and Edmund A. Proulx were involved in the importation and distribution of large quantities of marijuana. On January 6, 1990, DEA agents followed a red pick-up truck from the home of Leopold DeMarco at 945 Scituate Avenue in Cranston to T.F. Green Airport in Warwick and then to the home of Czarnecki.

Upon arrival at Czarnecki's home, the truck pulled into the garage. After approximately twenty minutes, the agents arrested Czarnecki, Lamoureaux and Proulx in the driveway of the house. At the time of the arrest, Proulx stated that he was at the premises to unload marijuana from inside the truck.

Pursuant to a federal search warrant that covered both the premises and the truck, DEA agents searched the house. Inside the house the agents found $33,000 in United States currency, a triple beam scale, plastic bags, and tape. In order to search the truck, the agents seized it and transported it to a garage. There the truck was placed on lifts and partially dismantled. In the bed liner of the truck, the agents found 400 pounds of marijuana.

Czarnecki was charged with possession with intent to distribute 100 kilograms of marijuana, conspiracy to possess with intent to distribute 100 kilograms of marijuana, and maintenance of a place for the purpose of distributing or using a substance containing a detectable amount of marijuana. The district court held three days of

hearings on motions to suppress various pieces of evidence including the 400 pounds of marijuana found in the truck. The court denied the motions.

After the motions to suppress were denied, Czarnecki pled guilty to an indictment charging him with possession with intent to distribute 100 kilograms or more of marijuana found in his garage, a violation of 21 U.S.C. § 841(a) and 841(b)(1)(B) and 18 U.S.C. § 2. Czarnecki was sentenced to a sixty-month prison term and a fine in the amount of $10,000 plus costs of his supervised release in the amount of $4,639.68 and the costs of his incarceration in the amount of $16,986.72.

B. Forfeiture Action

On January 11, 1990, DEA agents seized the defendant property pursuant to a federal seizure warrant. The United States, on February 2, 1990, instituted a forfeiture proceeding against Czarnecki's property pursuant to 21 U.S.C. § 881(a)(7).[3] Czarnecki and his wife then filed

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[3] Section 881(a)(7) provides:

(a) Property subject

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements which is used, or is intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of

(Continued on following page)

separate claims to the property. The district court, by a memorandum and order dated May 21, 1991, granted summary judgment in favor of the government on both Czarnecki's and his wife's claims. *See United States v. Poles 4-5, Bear Hill Road*, 764 F. Supp. 9 (D.R.I. 1991). Czarnecki appeals from the judgment.[4]

II.

Czarnecki raises three issues on appeal: (1) the court erred in finding as a matter of law a substantial connection between the subject property and drug activity; (2) the court erred as a matter of law by not suppressing the marijuana found in the truck; and (3) the court erred as a matter of law in not dismissing the government's claim on double jeopardy grounds.

A. Substantial Connection

Czarnecki first claims that the government failed as a matter of law to meet its burden of proof. He contends that the government did not show a probable cause belief

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(Continued from previous page)

> this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or the consent of that owner.

21 U.S.C. § 881(a)(7).

[4] Czarnecki's wife, Donna Czarnecki, does not appeal from the grant of summary judgment below.

that there was a "substantial connection" between the illegal drug activity (including the 400 pounds of marijuana concealed in the truck parked in the garage) and his residence, the subject of the forfeiture action. We disagree.

The government may obtain the civil forfeiture of any real property used for or that facilitated violations of the drug laws under 21 U.S.C. § 881(a)(7). *United States v. 28 Emery Street,* 914 F.2d 1, 3 (1st Cir. 1990). Initially it need only show probable cause to believe that the property was used for a specified illegal purpose. *Id.; United States v. $250,000 in United States Currency,* 808 F.2d 895, 897 (1st Cir. 1987). "Probable cause to forfeit requires only 'a reasonable grounds for belief of guilt[,] supported by less than prima facie proof but more than mere suspicion.' " *28 Emery Street,* 914 F.2d at 3 (quoting *$250,000 in United States Currency,* 808 F.2d at 897).

Once the government meets its burden of proof by showing probable cause, the burden shifts to the claimant to prove by a preponderance of the evidence that the property is not subject to forfeiture. 19 U.S.C. § 1615 (21 U.S.C. § 881(d) makes customs law burden shifting provision applicable); *see also 28 Emery Street,* 914 F.2d at 3. Property is not subject to forfeiture if the claimant can demonstrate either that he had no knowledge of the illegal purpose or that he did not consent to its use. *Id.; $250,000 in United States Currency,* 808 F.2d at 900.

To meet its burden of proof, the government must show a "substantial connection" between the drug activity and the property to be forfeited. *28 Emery St.,* 914 F.2d at 3. We find that the government met its burden in this

case. Agents found 400 pounds of marijuana in a truck which prior to its seizure had been located in the garage attached to the house. Upon arrest Proulx stated that he was there to unload the contents of the truck. Further, found inside the house by the agents was $33,000 in cash, a triple beam scale, plastic bags, and tape, so-called tools of the drug trade. Finally, Czarnecki pled guilty to possession of the marijuana found in the truck. We find that there was probable cause to believe that the house was substantially connected to illegal drug trafficking.

B. Suppression of the 400 Pounds of Marijuana

Next, Czarnecki claims that the government would be unable to show a "substantial connection" between his residence and illegal drug activity if the marijuana found in the truck had been suppressed. He argues that the police, by the language of the search warrant, were only authorized to search the truck for marijuana. The agents, however, seized the truck and took it to a garage where it was partially dismantled in order to search it and then remove the marijuana from the bed liner. By seizing the truck, Czarnecki contends, the agents violated the warrant and therefore the marijuana should be suppressed.

In the context of the criminal adjudication, the district court held several days of hearings on a motion to suppress the marijuana found in the truck. The court denied the motion to suppress, finding that it was proper to remove the truck to another location because of the complexity of the search involved. We adopt the findings of the district court and find that the marijuana was

properly admitted as evidence in the forfeiture proceeding.

C. Double Jeopardy

Finally, Czarnecki claims that the forfeiture action should be dismissed on Double Jeopardy grounds. He claims that the civil forfeiture action is punishment for the purpose of the Double Jeopardy Clause. By sentencing him criminally and ordering forfeiture of the house, claimant argues that the government is punishing him twice for the same underlying conduct.

We have squarely addressed this issue in *United States v. 40 Moon Hill Road*, 884 F.2d 41 (1st Cir. 1989). In *40 Moon Hill Road*, we held that civil forfeiture was remedial not punitive in nature. *Id.* at 43-44. Finding civil forfeiture inherently remedial, we held that a civil forfeiture action following a criminal conviction does not violate the Double Jeopardy Clause. *Id.* at 44. The *40 Moon Hill Road* case forecloses this issue.

C. Conclusion

We find, as a matter of law, that there was "substantial connection" between the defendant property and illegal activity. Because Czarnecki never presented any facts to overcome the government's showing of probable cause, we affirm the district court's grant of summary judgment to the government.

Affirmed.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	C. R. NO. 90-014-03 P
VS.	:	DATE: 11/16/90
MICHAEL CZARNECKI, ET AL	:	

RULINGS ON PENDING MOTIONS - IN CHAMBERS

TRANSCRIPT OF PROCEEDINGS IN THE ABOVE-ENTITLED ACTION ON NOVEMBER 16, 1990, BEFORE THE HONORABLE RAYMOND J. PETTINE, SENIOR JUDGE.

Vivian S. Dafoulas, RPR-CM
206 Federal Building
Providence, RI 02903
(401) 421-3892

* * *

[p. 9] in that it will not afford them sufficient time to utilize such evidence, a motion for a reasonable recess will be entertained by me and favorably considered if I conclude fairness and justice so requires. Therefore to the extent recited supra, the motion of the defendants is denied.

Motion to suppress. The defendant has moved to suppress physical evidence seized from his home on January 6th, 1990 including a pickup truck containing 424 pounds of marijuana that was seized from his garage. For reasons which follow, the motion is denied.

The fact relating to this motion have been accurately detailed by the government in its memorandum. I will not take up any more of the scarce time available by reiterating them. Rather I'll state that I adopt them and instruct the government to file a copy of its memorandum in the record. If defense counsel takes issue with any of the facts as contained in this memorandum, I instruct them that they will have an opportunity to argue their position before me on Monday, November 16, 1990, which is the day before the scheduled time for the commencement of testimony which is Tuesday, November 27. I wish to point out that a hearing was held before me on September 5 and 6 [p. 10] and then again on September 17, 1990. I find that those hearings substantially reflect the facts as recited by the government in its memorandum with the additional testimony of two people, namely, Joseph Cardillo, a mechanic, and Agent Kathleen Bennett. I will touch upon Mr. Cardillo's testimony subsequently.

In argument the government argues that the search warrant authorized the search of the pickup truck. It points out that the search warrant is entitled "United States of America vs. Pole 7, Bear Hill Road, Cumberland, Rhode Island, two-story white trim contemporary with cedar shingle and double garage under house" and I emphasize "including a truck inside garage and shed on property occupied by Michael Czarnecki."

As the government further argues, the warrant goes on to command the search of the "person or place named above." In my way of thinking, one would have to strain logic to a filament to say that the place "named above" did not include the pickup truck and Czarnecki's house. I

quite agree with the prosecutor when he states that there is no other common sense reading of the warrant than to conclude the house and the pickup truck were included, and that the search included both.

[p. 11] The big argument or at least the one enthusiastically emphasized by defense counsel was that the seizure of the pickup truck was unauthorized. I do not agree. It appears to me that there was no alternative but to take this vehicle to the station house because it was not practicable and perhaps not safe to attempt to search at the Czarnecki house.

As the government points out, the agents knew that the truck contained hundreds of pounds of marijuana in a hidden compartment – they were authorized to search for this marijuana. However, it was bolted inside the flatbed truck, which could not be reached without mechanical knowledge and proper tools.

As I stated at the hearing on September 17, the whole theory of the government's position was whether it was legally sound to seize this truck. That is, was the truck in such a condition that there was nothing more they could do but to take it and bring it to the garage to actually conduct the search. The prosecutor agreed with me that that was his position. The soundness of it was established by the testimony of a Mr. Cardillo called by the government. Mr. Cardillo was an experienced mechanic.

In answer to the question as to whether or not [p. 12] the truck could have been dismantled outside the garage, Mr. Cardillo answered, "No." He stated or rather I should say, no with qualification. He stated that it would have been necessary to have the proper tools and "proper

knowledge". He said first you would have to check out the truck and to do that, you would need a floor jack – a substantial jack because "you would have to have a good size jack because you have at least a ton, ton and a half truck to pick up." He went on to explain that if this was done on soil, the person would be risking his/her life. He also stated that it would have been necessary to have two jack stands.

True, he did say this was material that could be bought in any Sears store and that a garage floor is concrete but he went on and explained that even with those tools, he doubted very much if all one had to do was crawl underneath the truck and unfasten the bolts. He stated "I doubt it. It would have been very hard. You could have had a hard time opening up the top of the bed if you – if you didn't have an air chisel. If you didn't have an air chisel, you would have had a hard time opening up the top of the bed."

In answer to the inquiry as to whether or not a hand chisel could have been used, he explained that [p. 13] the angle would have made it most difficult because it was "right up to the side of the bed. To get at it, you would have not have been able to swing a hammer."

As I viewed his testimony in its entirety, it was obvious agents could not have dismantled the truck in the garage. I conclude that it was proper to seize the truck and remove it to a different location where it could be searched more conveniently and safely. Probable cause to search this truck existed. The government was not required to seek another warrant to search the vehicle – the original probable cause justified the search and the

complexity to conduct the search justified its removal to the station house.

Now, as to the other material seized, I find they were all properly seized and are admissible either because the warrant specifically authorized their seizures or because they were covered under the plain view doctrine.

Finally, I find that the protective sweep was proper. The facts in this case justified what the agents did. The premise for the protective sweep existed, that is, probable cause.

Certain exigencies existed here. The agents had reason to believe that evidence would be destroyed if they did not make an immediate entry. They had the [p. 14] right to pass through the premises to check for people who may destroy evidence. It must be remembered that the defendants saw the agents approaching. They seized no evidence. They looked only in places large enough to conceal a person. One would be naive to believe that the agents did not have to be concerned with the possibility that there may have been armed defendants present. This certainly justifies a protective sweep. Can anyone deny that firearms are not the "tools" of drug dealers? And indeed firearms were found in the house of DeMarco and Lamoureux.

Let me conclude by quoting from the government's memorandum at page 26 in saying that, in my opinion, the prosecutor is correct in his argument; that there was probable cause to arrest Czarnecki. "It is almost inconceivable that DeMarco would have driven the truck to Czarnecki's house and allowed the partial dismantling of the truck on Czarnecki's premises had Czarnecki not

been involved in the conspiracy. In addition, earlier that day Lamoureux told DeMarco on the telephone that he, Lamoureux, had just talked to Mike and it was all set. Proulx said he had unloaded marijuana previously for the same individuals which included Czarnecki."

The other arguments raised by defendants are [p. 15] without merit. The motion to suppress is hereby denied.

PAUL LAMOUREUX: The defendant has filed two motions to suppress. I do not find any material difference in these motions from that which was filed by Mr. Czarnecki. The rationale and the reasons I gave for denying Czarnecki's motion to suppress appear to me to be applicable here. Therefore I deny the motion reserving to the defendant the right to argue on Monday why Lamoureux's motion should be treated differently from that of Czarnecki.

LEOPOLD DEMARCO: Motions to suppress; electronic surveillance; probable cause. To begin with, I have received no detailed memorandum from the defendant in support of this motion. In reading the affidavit of Detective Henry Roy, I find it is more than sufficient to establish probable cause. Since I have received no specific attack as to any of its provisions, I will not detail my justification for holding its supports probable cause.

Defendant argues that the wiretap was not properly authorized. There is no merit to this argument. See Rhode Island General Laws 12.5.1-4.

I fail to understand the other arguments propounded by the defendant such as:

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